

1
2
3
4
5
6
7
8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF OREGON

11 IN THE MATTER OF THE)
12 EXTRADITION OF) No. 08-MJ-430
13)
14 JAYANT MUKUNDRAY PATEL) ORDER re: APPOINTMENT
15) OF COUNSEL
16)
_____)

17 HUBEL, Magistrate Judge:

18 Dr. Jayant Patel was arrested on March 11, 2008, pursuant to
19 an Extradition Complaint seeking his extradition from the United
20 States to Australia. He was initially represented by the Federal
21 Public Defender who represented him during an interview by United
22 States Pretrial Services, during his first appearance before the
23 Court, and during a March 18, 2008 release hearing.

24 Prior to the March 18, 2008 release hearing, the Federal
25 Public Defender's Office advised the Court by letter of March 14,
26 2008, that, in its opinion, Dr. Patel did not qualify for court-
27 appointed counsel and that he should be directed to retain a lawyer
28 and he could be required to reimburse the Federal Public Defender's

1 Office for the time and expenses it incurred after March 11, 2008.
2 Private counsel, appearing on Dr. Patel's behalf for the limited
3 purpose of asserting his right to appointed counsel, argues that
4 contrary to the Federal Public Defender's assessment, Dr. Patel
5 does qualify for court-appointed counsel under the Criminal Justice
6 Act (CJA), 18 U.S.C. § 3006A. The government agrees with the
7 Federal Public Defender's Office, arguing that Dr. Patel is not
8 entitled to court-appointed counsel given his financial assets.

9 I accept Mr. Blackman's appearance for the limited purpose.
10 There is no reason to preclude the respondent from having counsel
11 for this limited purpose.

12 However, I agree with the Federal Public Defender and the
13 government. The CJA requires appointment of counsel for "any
14 person financially unable to obtain adequate representation[.]" 18
15 U.S.C. § 3006A(1).¹ "If at any time after the appointment of
16 counsel" the Court determines that the "person is financially able
17 to obtain counsel" or is able to make a partial payment, "it may
18 terminate the appointment of counsel or authorize payment as
19 provided in subsection (f), as the interests of justice may
20 dictate." 18 U.S.C. § 3006A©).

21 At the initial appearance of the respondent on March 11, 2008,
22 I appointed counsel for that initial hearing due to the obvious
23 difficulty of getting retained counsel on such short notice for the
24 hearing. I directed the Federal Defender's office to assist the
25 respondent in filling out a financial affidavit regarding his

26
27 ¹ For the purposes of this decision, I assume appointment
28 of counsel is warranted in extradition proceedings. The
government has provided any authority suggesting otherwise.

1 qualification for appointed counsel. The government at that time
2 stated that while it saw no legal basis for the appointment of
3 counsel, it did not oppose the appointment of counsel. The
4 government did request that the respondent submit an affidavit
5 supporting his qualification financially for the appointment of
6 counsel.

7 When the submitted affidavit did not resolve the court's
8 concerns, further detail was requested from the respondent at the
9 March 18, 2008 hearing and Mr. Blackman has assisted the respondent
10 in supplying the court with the additional information. At that
11 hearing the Federal Defender reiterated the position that,
12 respondent did not qualify for appointed counsel and sought
13 withdrawal from the case after the release hearing on March 18,
14 2008. Respondent wanted to proceed with the release hearing that
15 day. I indicated at that hearing a preliminary inclination to deny
16 the respondent appointed counsel on the basis of his ability to
17 retain competent counsel to represent him in this extradition
18 proceeding, but I agreed to accept further briefing on this subject
19 from Mr. Blackman on the respondent's behalf and from the
20 government. It is clear that the Federal Defender's office has not
21 undertaken anything on the respondent's behalf to date beyond the
22 initial appearance and preparation for and presentation of
23 respondent's request for release from custody which was taken up at
24 the March 18, 2008 hearing and is under advisement now.

25 I base my decision that the respondent does not qualify for
26 appointed counsel on the fact that Dr. Patel has substantial assets
27 in various investment accounts. The significant amount of money in
28 his Individual Retirement Account (IRA) is certain to be many times

1 the sum required for retention of counsel for the extradition
2 proceedings.

3 Dr. Patel relies on United States v. Lexin, 434 F. Supp. 2d
4 836 (S.D. Cal. 2006), in support of his position that his IRA
5 account should not be considered. I do not find the decision
6 persuasive and I note it is not binding on this court. First, the
7 Lexin court held that the defendants there were entitled to court-
8 appointed counsel even considering all of the defendants' assets,
9 including their IRAs. Id. at 840. This was presumably based on
10 that court's belief that the costs of defense of all matters would
11 be in excess of \$1,500,000. The court proceeded to analyze the
12 propriety of considering the IRAs only as part of its discussion
13 regarding any partial payment obligation that it might assess
14 against the defendants. Id. Thus, the court's holding that the
15 IRAs should not be considered is properly treated as dicta in
16 regard to any decision on the actual appointment of counsel.

17 Second, I reject the argument put forth in Lexin that because
18 taxes are not assessed on IRA funds until the time of distribution,
19 the funds are to be considered "future income" which should not,
20 under The Guide to Judiciary Policies and Procedures ("The Guide"),
21 be considered in the determination of whether an individual is
22 entitled to court-appointed counsel. Simply because an IRA account
23 (in a traditional IRA) is not taxed until those funds are withdrawn
24 does not make the funds in that account "future income" in the
25 sense contemplated by The Guide. The deposits into an IRA are, for
26 most people, from past earned income. The income is "future" only
27 in the sense of when it is taxed, not when the respondent comes
28 into possession of it. There is no act by the IRA account holder

1 between the time of a deposit into the IRA and its later withdrawal
2 that can be characterized as "earning" the money. Thus, it is
3 inappropriate to consider the funds in the IRA account as "future
4 income."² Respondent's other authorities regarding the IRA account
5 are neither controlling, nor persuasive.

6 I conclude that considering the funds in Dr. Patel's IRA
7 account is appropriate. While his withdrawal of funds before he
8 reaches age 59½ may result in a penalty and withdrawal at any time
9 subjects the funds to taxes if they went into the account tax free,
10 the funds are nonetheless available to the respondent.

11 Additionally, even if I do not consider Dr. Patel's IRA, the
12 financial information Dr. Patel provided to the Court indicates
13 that he possesses an individual brokerage account, which is not
14 characterized as a retirement account, in which he has a sizable
15 amount of money. No argument has been made that this account
16 should not be considered in the Court's assessment. It too appears
17 sufficient by itself to retain counsel.

18 In making this determination, I have not needed to consider
19 any other assets reported by Dr. Patel, nor have I considered his
20 wife's separate assets or income. I have also not considered his
21 ability to borrow against his IRA account or any other asset. The
22 IRA and the non-retirement brokerage account provide more than
23 sufficient assets from which Dr. Patel can retain counsel for this
24 extradition proceeding. Dr. Patel's request for continued court-
25 appointed counsel is denied.

26
27 ² I note too, that the Lexin decision makes no mention of
28 the possibility that the defendant may have a Roth IRA in which
deposits into the IRA account are made with after-tax dollars.

1 In his memorandum, counsel for respondent makes an argument
2 regarding the importance of continuity of counsel and the
3 importance of the relationship he established with Ms. Russell of
4 the Federal Defender's office. In this regard I note several
5 things. First, by asking for the affidavit to support his
6 qualification for appointed counsel at the first hearing, I clearly
7 indicated the importance that he qualify financially for appointed
8 counsel. Respondent's answer when I asked if he could afford to
9 retain counsel was hesitant.

10 Second, Ms. Russell made it clear at the hearing on March 18,
11 2008, that she had not made any efforts to begin preparation for
12 the extradition hearing itself, but limited her efforts to
13 preparing for the release hearing that day. Indeed, Mr. Wax, the
14 Federal Defender, wrote the court on March 14, 2008, and copied
15 respondent, indicating that the information he had reviewed
16 suggested respondent could retain counsel on his own, and that he
17 had advised Mr. Patel that the Defender would be recommending to
18 the court that Mr. Patel be directed to attempt to retain counsel
19 for the extradition proceeding. This letter also reminded the
20 court and Mr. Patel that the court can order the CJA account to be
21 reimbursed by Mr. Patel for the representation provided to date.
22 The Defender took the position that any such reimbursement order
23 should be limited to work after the day of the initial appearance
24 March 11, 2008.

25 Thus, the representation by appointed counsel commenced with
26 an acknowledged requirement that respondent must qualify for
27 appointed counsel, and that he needed to submit financial
28 information to demonstrate his qualification. The representation

1 continued for less than four days before the respondent was on
2 notice the Federal Defender was recommending the court direct the
3 respondent to retain his own lawyer. Continuity of representation
4 on these facts is not sufficient to overcome the conclusion I reach
5 that respondent can and should retain his own lawyer.

6 I grant the Federal Public Defender's request to withdraw as
7 appointed counsel and order Dr. Patel to reimburse the CJA fund for
8 the services of Assistant Federal Public Defender Susan Russell,
9 after March 11, 2008, through March 18, 2008. Ms. Russell is
10 ordered to submit, within two weeks of the date of this Order, an
11 affidavit setting forth the time spent, the tasks performed, and
12 the amount sought per hour, for reimbursement.

13 Dr. Patel has fourteen days from the date of Russell's filing,
14 to file any objections to the amount sought or to the order
15 allowing reimbursement herein.

16 IT IS SO ORDERED.

17 Dated this 28th day of March, 2008.

18
19 /s/ Dennis J. Hubel

20 _____
21 Dennis James Hubel
22 United States Magistrate Judge
23
24
25
26
27
28